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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of AKHILESH and
ANJALI JHA.

AKHILESH KUMAR JHA,

Appellant,

v.

ANJALI JHA,

Respondent.

D059420

(Super. Ct. No. DN140918)

APPEAL from an order of the Superior Court of San Diego County,

Sim von Kalinowski, Judge. Affirmed.

Appellant Akhilesh Kumar Jha (father) appeals the trial court's modification order awarding respondent Anjali Jha (mother) sole legal and physical custody of E.J., their minor daughter, after a long cause evidentiary hearing in which the court found true by a preponderance of the evidence the allegation that father had sexually abused E.J. Father

contends the trial court abused its discretion by excluding the Abel Assessment of Sexual Interest (Abel test) advanced by his expert witness and by admitting over his objection the testimony of mother's therapist, which father claims was improper expert testimony.

As we discuss, we reject both contentions of father and thus affirm the trial court's modification order.

FACTUAL AND PROCEDURAL OVERVIEW¹

After 15 days of trial spanning about 17 months, the trial court issued a 39-page statement of decision (SOD). The SOD shows the trial court meticulously considered the evidence proffered by the parties and the credibility of the parties and their witnesses in making its findings. We now turn to the trial court's detailed SOD, most of which is provided below, as a precursor to evaluate father's claim that two evidentiary errors by the trial court warrant reversal of its modification order awarding mother sole legal and physical custody of E.J.²

"The above entitled matter came on for a long cause evidentiary hearing on July 9, and November 4, 2009, February 10 and 11, April 7 and 14, May 5, July 14, August 25,

¹ As discussed *post*, in reviewing a judgment or order based upon a statement of decision following a bench trial, "any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision. [Citations.]" (*In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 358.)

² Mother was self-represented in the long-cause evidentiary hearing. The trial court in its SOD notes mother was "highly prepared and represented herself as well as many attorneys, and better than some, who have appeared in this court." Mother is also self-represented on appeal.

September 8 and 15, and October 8 and 15, 2010^[3] The court has reviewed all six volumes of the case file, all of the transcripts, its notes, and the evidence, and having considered the pleadings, the evidence, and the arguments on behalf of the parties[], the court issues the following decision and rules as follows:

"I

"Procedural History

"The matter was originally filed on April 22, 2009, by Mother as a domestic violence temporary restraining order [TRO] against Father alleging sexual molest of E.J., age 5. Prior to this order, the parents shared joint legal and physical custody of E.J. On May 12, 2009, the date set for the hearing on the TRO, the matter was converted by the court to an evidentiary hearing on an Order to Show Cause to modify child custody and visitation. The court reviewed a Child Protective Services [CPS] letter to the Family Court indicating there was an ongoing sexual abuse investigation and recommending no contact between E.J. and Father. The court also reviewed a Family Court Services [FCS] report dated May 1, 2009, which related to the allegations by Mother of molest, the ongoing CPS investigation, and the recommendation that there be no contact between the minor and Father. Minor's counsel was appointed to represent the child, and interim child custody orders were issued, suspending Father's custody and visitation pending the

³ The court noted that the parties' original time estimates for the evidentiary hearing "proved to b[e] wildly inaccurate," but that due to the "serious nature of the allegations" the court allowed the parties "to add pertinent witnesses as the case progressed" and allowed the parties to "delve into peripheral matters that, although peripheral, were central to their theory of the case."

ongoing law enforcement and CPS investigations The matter was re-referred to FCS on an expedited basis for their evaluation with a Long Cause Order to Show Cause Hearing set for the afternoon of July 9, 2010, with the parties giving a 40-minute time estimate. On July 9, 2009, the court reviewed the FCS report from July 2, 2009, which among other information, indicated law enforcement had determined the allegations were 'unfounded,' but that CPS had 'substantiated' the allegations. The evidentiary hearing began and continued for the remainder of the day but did not conclude. The parties gave a half-day time estimate to conclude. The FCS report recommended that Father continue to have no contact with the minor in view of the serious nature of the allegations as they affected the child's health[,] safety and welfare, and the court concurred in this evaluation while the matter proceeded. The court directed that [m]inor's counsel contact the child's therapist to see if the therapist felt it was in the child's best interest for Father to have supervised visits and if the therapist thought so, to report back to the court on an exparte basis. The hearing thereafter proceeded on the dates noted above.

"The following witnesses, with their roles, testified in this matter:

"Akhilesh Jha - Father/Petitioner[;] [¶] Anjali Mishra (fka Jha) - Mother/Respondent/moving party[;] [¶] Kenneth Jones - San Diego County Sheriff's Detective[;] [¶] Dr. Raymond G. Murphy, PhD. - Father's retained expert psychologist[;] [¶] Christina Schultz, MSW - Forensic Interview Specialist, Palomar-Pomerado Health, Forensic Health Services, Child Abuse Program[;] [¶] Lillian Rodriguez, MSW - Counselor, Superior Court Family Court Services[;] [¶] Susan Melendez, MSW - San Diego County Child Protective Services[;] [¶] Dr. Stephen Doyne, PhD. - Mother's

treating therapist[;] [¶] Dr. Robert Simon, PhD. - Mother's retained rebuttal expert psychologist[; and] [¶] Murphy Reed - minor's preschool director[.]

"II

Facts and Time Line

"Mother and Father are the parents of E.J. The parents separated on or about February 15, 2006. E.J. was two at the time of separation. Prior to these proceedings, the parents shared joint legal and physical custody of E.J. per a December 22, 2006, order (hearing November 20, 2006) that incorporated an October 5, 2006, mediation report from Penny Angel-Levy, MFT, indicating the parties agreement as to child custody. The court file reveals that although the parents have significant conflicts over financial matters, the only OSC filed involving the child between the 2006 child custody order, and the present litigation, was a dispute over what school the child would attend. There were no OSC's filed by either parent to modify child custody or visitation during the two and a half year period immediately prior to the current proceeding.

"A. Time Line April 2009

"**Early 2009** - Father notifies Mother he intends to take E.J. to Europe for the vacation time he was allotted in the existing child custody/visitation order. Mother objects, telling Father she thought he would deny her access to the child, that he would abduct the child and not return. In 2008, Mother had not allowed Father to take E.J. to India to visit family. (Both Father and Mother are originally from India.)

"**4/1/09** - Father files an exparte application re Mother's refusal to allow the minor to accompany Father to Europe. A 20 minute hearing is scheduled for 4/28/09.

"Early April 2009 - Mother retains Sohini Desai [Nanny] as her nanny for E.J. Nanny is an elderly Indian woman who spent the majority of her life in India and who now lives in Mother's apartment complex. Nanny watches E.J. . . . from the time the child gets out of school until when mother gets home from work, approximately 7 p.m. Nanny bathes the child, feeds her dinner, and prepares her for bed.[⁴]

"4/14/09 (Tuesday) - per Mother's testimony, when mother arrives home, Nanny was quiet and unhappy. [R.T. 4/7/10 16:16-17] Nanny tells Mother E.J. has 'bad manners', in Hindi dialect meaning behaving sexually, that the child spreads her legs and vaginal parts, that she lays on the bed and spreads her buttocks and puts her finger in her anus.[⁵] Nanny also referred to her vagina and showed mother what E.J. was doing. [R.T. 2/11/10 46:16-28] Mother also testified that Nanny told her that the child would pull the Nanny's clothes and look inside [her] vaginal area, that she tries to squeeze Nanny's buttocks and put her hands inside Nanny's butt, that in the bathtub she was spreading her back and would do the same while laying on the bed and then turn around and spread her front vaginal area. [R.T. 4/7/10 16:8-10 27] Mother testified Nanny told her Nanny asked E.J. '[W]hy do you do that?' and E.J. responded 'my daddy does that to me, and don't tell my mom.' [RT. 4/7/10 16:28-17:2] Mother says the information was 'a shock' to her and that she was not sure if Nanny was telling the truth. [RT. 2/11/10 47:3-

⁴ "In late April 2009, Nanny went to Canada to see her adult son and has not returned. Prior to her departure, Nanny spoke with Sheriff's deputies and CPS social worker Melendez."

⁵ "There was no objection to Mother testifying as to what Nanny had told her."

6] Mother also testified she did not believe Nanny at this point, that she did not want to believe her daughter has sexual behaviors or that anyone has taught her sexual behaviors. [R.T. 2/11/10 40:19-26; 4/7/10 17:15-23] [Essentially the same at R.T. 8/25/10 19:21-20:17]

"4/15/09-4/19/09 - Between these dates Mother does not speak to either Nanny or E.J. about this conversation. [R.T. 4/7/10 17:24-18:7]

"4/16/09 - 4/18/09 - The parents agree Father exercises his usual visitation per the existing court order with E.J. On 4/18/09 (Saturday), Mother and Father meet at basketball practice for E.J. Per Father, Mother is angry at Father 'as usual' and tells him she is not going to let him take him E.J. to Europe and then says he is never going to see the child go to college because 'you will die before that.' [R.T. 8/25/10 68:15-69:1] Both parents agree Mother did not raise the allegations made by Nanny and that Mother showed no concern for E.J. being with Father. Mother testified she did not raise the issue with Father because she 'did not believe my own daughter's father would ever do that to her', that she 'did not want to believe any of that', that she would not talk to Father about it unless she was certain. [R.T. 4/7/10 18:19-19:7]

"4/19/09 (Sunday) - per Mother's testimony: [¶] In the morning, Nanny approaches her at church after the service they both attended. Nanny tells mother in Hindi that 'I know you don't want to talk about it but that I [Nanny] need to speak with you . . . it is important that you listen . . . that Father is teaching [child] bad manners, he plays with her in bad manners, he makes it a game for her, he pulls her clothes down, looks at her front and back, he appreciates it, he pokes his finger inside her buttocks.'

[R.T. 4/7/10 15:4-16:5; essentially the same at R.T. 8/25/10 20:18- 21:3] Mother also testified that in this conversation Nanny told her that for the time she had been taking care of the child [approximately two weeks] she had 'been noticing something different' and was 'trying to get information from the child' and finally the child said that my father tells me this, and that the child also told Nanny not to tell Mother because she doesn't like it. [R.T. 8/25/10 21: 4-12][⁶]

"In the afternoon, Mother took the child for a walk and had her first conversation with E.J. regarding the information from Nanny. E.J. tells mother, '[Y]es, Daddy touches me in front and back' [private areas]. Mother relates she 'couldn't carry the conversation' and stops. [RT 2/11/10 41:24 - 42:1] On direct, Mother testifies she asked E.J. if daddy had touched her, or played the way Nanny was explaining, and E.J. said yes, that he always does that to her, that he touches her and looks at her vagina, he tells her she is beautiful there, he pokes his finger in his [*sic*] rectum, he squeezes her buttocks and flaps it. Mother testified the child was saying this as if it were normal. Mother also testified E.J. said daddy tells her about married kisses and wants to give her married kisses. Mother testified she couldn't take anything more at that time and [ended the conversation]. [RT 8/25/10 22:1-17]

⁶ "Mother also testified as to what Nanny told her without differentiating which date, or being asked to, at R.T. 2/11/10 41 :6- 20. The description was that Nanny told her the child is behaving sexually; Nanny tried to talk to her several times; finally the child disclosed that her daddy does those to her; Nanny said it was important for her to tell Mother though she knew Mother didn't want to hear it; Nanny said Father plays with her [E.J.'s] private parts, putting finger, moving around in her vagina, putting finger in [her] anus, pulling her pants down, looking at her privates, and appreciating her."

"In the evening at their apartment complex, Mother approaches Nanny to have a second conversation with regard to Nanny's allegations. Mother testifies Nanny told her that Father squeezes the child's buttocks and pokes his finger 'in her back', and told about the child spreading her butt apart. [R.T. 4/7/10 9:12-14:17]

"Mother has a second conversation the same day with E.J. during a walk in the evening. [R.T. 2/11/10 44:13-21] E.J. points to her ring finger, then 'pointed to her vagina, [then] pressed the finger a little inside and showed round round.' [R.T. 2/11/10 42:13-22]

"4/20109 - On Monday, Mother has a third and fourth conversation with E.J. [R.T. 2/11/10 45:3-6] In the third conversation[,] E.J. told Mother 'about buttocks. [Father] squeeze the buttock and flap it.' [R.T. 2/11/10 43:2-8.] In the fourth conversation E.J. told Mother[,] 'Daddy tells me to have a baby. He wants to give me married kisses on my lips.' [R.T. 2/11/10 43:9-14] When these conversations occurred was not asked.

"Mother testified that on 4/20/09, she spoke with a friend about what Nanny had said and that her friend advised her not to 'sit on it' and to contact law enforcement. After Mother took E.J. to preschool, she called 911 and the Encinitas' Sheriff responded and came to her house. Mother testified the Deputy took statements both from her and Nanny, and Nanny was demonstrating to the Deputy the conduct she had observed. Mother further testified she 'was still vacillating if it could be true, how could it be true?' and that she 'was still trying to absorb the information.' [R.T. 8/25/10 22:18-24:5] Mother testified she told the Deputy what the child and Nanny had told her, including

that Father 'poking finger in private area front and back, buttocks squeeze, praising the front and back.['] [R.T. 2/11/10 39:20-40:14] Mother also testified she told the Deputy [that] Nanny had disclosed this information to Mother on April 14, and that Mother told the Deputy she waited to report it because she was trying to gain more information from the child. [R.T. 2/11/10 40:19-26] Detective Jones verified through Sheriff's Dept. records that Deputy Zeid did respond to a phone complaint by Mother of child molest on April 20, 2009. [R.T. 7/9/09 11:15-22, 28:1-5 12]

"Mother took E.J. to her pediatrician The pediatrician told her it was a very intrusive process and she wanted the police to investigate and that they may have an exam done. Mother did not specifically recall the date but the CPS report indicated this date. [R.T. 2/11/10 45:25-46:15]

"4/21/09 - CPS Protective Services' Worker Susan Melendez contacted Mother by phone in the morning. CPS had received the referral on 4/20/09, and had been assigned to Melendez on 4/21. [R.T. 5/5/10 2:2- 4:1] Mother testified that she was 'still not certain if it was a child molest or what really was going on.' [R.T. 8/25/10 24:8-12] CPS Worker Melendez testified that when she first contacted Mother, Mother 'basically brushed me off,' said she was on her way to work and would call her from there. Melendez testified that when they spoke after Mother arrived at work, Mother in essence related that she wasn't real sure if there was anything there, that she couldn't believe that anything had happened to her daughter, that she liked the current custody split of 50/50 just fine, and didn't want to rock the boat. [R T. 4/14/10 12:6-28]

"CPS Worker Melendez testified that she went to E.J.'s school and interviewed her in the presence of a school staff member. Neither parent was present. Melendez explained to E.J. that it was her job to talk to children and grown-ups 'about safety.' Melendez related that the child was highly intelligent, very forthcoming for most of the interview, was very animated, with lots of eye contact. However, when the child was asked if anyone ever touched her in private areas[,] she behaved differently, she said 'no' but was looking down and to the side, 'very different than the responses I got to the other questions.' Melendez testified to her belief that there was 'obviously something there.' Melendez testified that she asked: 'Geez, that's kind of weird, because I could have sworn that somebody told me that somebody did touch your privates[,] to which E.J. responded 'my daddy.' When the child made this statement she did not look at Melendez, and it appeared to Melendez that the child did not want to talk about it. [RT. 4/14/10 5:12-8:27] Melendez testified the child did not disclose anyone else had touched her privates. [R.T. 4/14/10 9:20-22] Melendez also asked E.J. if she had told anyone else about Father touching her privates, E.J. said someone, but Melendez could not understand the name, and her grandma. [R.T. 5/5/10 17:3-15] The child also said she had talked to Nanny, but that information was not reflected in Melendez's report or notes. [RT. 5/5/10 18:17-19:5] Melendez ended the interview. Melendez testified that she found the child to be credible. [R.T. 4/14/10 10:5-6]

"Melendez testified that she interviewed E.J. a second time at school that day, a couple of hours later, but could not recall what was said. [R.T. 4/14/10 9:23-10:4, 28:15-29:8.] Her report did not include notes of this interview. [R.T. 5/5/10 19:9-15]

"Melendez also testified that she interviewed Nanny by phone on this date.^[7] Melendez indicated she had a hard time understanding Nanny because sometimes her word order did not make sense, but it appeared to her that Nanny understood Melendez. [R.T. 4/14/10 36:27-37:23] Melendez testified that Nanny told her she had provided day care for about two weeks from when E.J. came home from school until Mother came home from work; that she would feed and bathe her and get her ready for bed. Nanny told Melendez that when E.J. would have her clothes off, she would touch her private areas and would touch the sitter's private areas, that she would lay on her back and expose her genitalia. [R.T. 4/14/10 13:4-27] Nanny also told Melendez that when E.J. would touch her private parts and touch Nanny's private parts, she would tell her not to, and E.J. said that daddy is the one who touches here there (later corrected to say Nanny related E.J. said Daddy plays with her that way [R.T. 4/14/10 41:18-42:18]), and didn't want Nanny to tell Mother. [R.T. 4/14/10 17:1-8] Nanny did not tell Melendez that the child claimed Father sticks his finger in her vagina or rectum, nor did Melendez ask Nanny this question. [R.T. 4/14/10 39:24-40:30]

"When E.J. returned from school, she told Mother that someone at school talked with her about a safety rule about daddy touching private parts. Mother relates E.J. was very angry with Mother for not teaching her the safety rules. [R.T. 2/11/10 43:17-23.]

⁷ "There was no objection to Melendez testifying as to her independent recollection of what Nanny told her, there only was an objection to Melendez testifying as to the direct quotes from her report. The court allowed the direct quotes as an operative fact i.e., the basis of the investigation, but not for the truth of the matter asserted, and has not considered the quotes from the report in its analysis."

This occurred after the CPS worker had talked to E.J. [R.T. 2/11/10 45:7-11] Mother testified she took E.J. for a walk and asked her, now that you know about touching the private area, tell me what else daddy does with private area. Mother testified E.J., while they were sitting on a wall, used her ring finger and pushed it inside her vagina and started turning it around. [R.T. 8/25/10 26:5-21] [Citation.]

"Also on April 21, Detective Jones was assigned to investigate the case for a violation of Penal Code section 288(a), lewd or lascivious act with a child under 14, however, he did not begin his active investigation until April 24, 2009. [R.T. 7/9/09 10:23-26, 18:22-19:17]

"April 22, 2009 - CPS Worker Melendez met with Mother again in the morning at her home and asked her to get a TRO, she then met her at court to help 'walk her through' the process. [R.T. 4/14/10 17:18-18:2, 5/5/10 10:9-23] Mother filed for the TRO. Melendez testified as to Mother's statements and demeanor while at court to get the TRO: Mother said she couldn't believe a parent could possibly do what Melendez had told her E.J. was disclosing, that Mother said she felt like a terrible mother because she should have known something was going on, that Mother appeared to Melendez 'to be in a state of shock, [was] kind of white, [was] shaking, tears would go down [her] face quietly on and off for the few hours [Melendez] was there.' [R.T. 4/14/10 18:21-19:10]

"Mother also filed her response to Father's OSC regarding taking E.J. to Europe on vacation. [Exhibit AI] Mother's response does not mention the molest allegations, objects to taking the child outside of the U.S. (there was a typo that left out a 'not'), but

gives permission for Father to a vacation within the U.S. The signature on the response is dated April 21, 2009.

"April 22-28, 2009 - E.J. was not interviewed during this time period prior to the forensic interview by either law enforcement or CPS. [Detective Jones never interviewed the child as he did not have the training or experience necessary to do so - RT. 7/9/10 29:4-15; re CPS worker Melendez see R.T. 4/14/10 29:22-30:6] It is unclear if Mother spoke with the child during this period regarding the allegations. Mother testified she had numerous other conversations (after those documented above) with E.J., especially after E.J. started therapy (which occurred after the forensic interview, the first therapy session being 6/4/09 [Exhibit N-2, pg. 4, [¶] 2]), but does not recall specific dates. [R.T. 2/11/10 44:3-12]

"April 29, 2009 - E.J. undergoes a forensic interview conducted by Christina Schultz, MSW, Forensic Interview Specialist, Palomar-Pomerado Health, Forensic Health Services, Child Abuse Program. Shultz has conducted over 400 forensic interviews of children. [R.T. 2/10/10 26:10-12] Shultz describes her role as a fact finder, to ask developmentally appropriate questions, that she does not make conclusions, nor a determination of whether a child is lying or telling the truth, that she does not have a way to determine if a child is elaborating actual events or imaginary stories, and that the interview protocol does not have an element to determine whether a child has been coached. [R.T. 2/10/10 6:24-26, 7:18-22, 20:2-15, 25:24-27] The entire interview is recorded on DVD and that the DVD reviewed by the court [Exhibit 1] is a true and accurate recording of the entire interview of E.J. [R.T. 2/10/10 13:20-22, 64:8-65:5] The

recording is approximately 51 minutes in length. The interview was witnessed through one-way glass by Detective Jones, CPS worker Melendez, Mother, grandmother, and a deputy district attorney.

"The following is a synopsis of that interview from the court's review of the DVD recording:

"Shultz starts the interview with E.J. by explaining to her that it's ok to say you don't know or don't remember, that if you don't understand to say so, and that sometimes Shultz makes mistakes and she wants E.J. to correct her if she does. Shultz asks some questions and makes some statements to test if E.J. will follow these directions and she does. Shultz also establishes that E.J. understands what a lie is and that it is important to tell the truth. Shultz also asks questions that have E.J. demonstrating that she understands the concepts of over and under, front and back, and inside and outside. Most questions are asked in an open ended manner such as 'tell me about . . . ' 'what do you mean . . . ' except for follow-ups to particular questions asking for more information where disclosures have already been made by E.J. Pertinent questions and responses include:

"-After E.J. says her parents got divorced and is asked to 'tell me about that', E.J. says 'Mommy got divorced from dad ... [they] were not getting along . . . dad got a little money from mom . . . [dad] left my mom and me all alone . . . ' E.J. also volunteers a remark about '[paternal grandmother], when I was a baby, put me outside with mom with a little bit of clothes and I used to be cold[.]'

"-When asked why did she come here today, E.J. responds 'my mom wants to teach me about safety.'

"-When asked 'has something happened with you' E.J. responds 'My dad tells me he's going to give kiss . . . kiss on lips . . . but he really doesn't.'

"-When asked 'Has somebody done something to you that they should not have done?' E.J. responds 'My dad touches me in the front private area also.'

"-Shultz then shows E.J. a drawing of an anatomically correct girl, front and back, and asks 'you said your dad touches you where?' E.J. points to the vagina and buttocks and when asked what each is called, E.J. responds 'private area.'

"-When asked 'did he touch you there on one day or more than one day,[]' E.J. responds 'more than one day.'

"-In answer to various questions, E.J. indicates that the touching started when she was '3 and one-half' and the last time it occurred she was, after a pause 'four.' She relates the touching occurred at her dad's house 'after he moved out.' E.J. also relates 'He used to touch me after I go to school and he picks me up, he used to touch me over and over again and after he stopped doing that he said going to give me a married kiss and then my brain doesn't work.'

"-When asked 'what did your dad use to touch you on your part? (pointing to the vagina on the drawing)' E.J. says 'I can't understand[.]' Shultz then asks 'how did he touch you there?' and E.J. responds 'round round and straight straight.'

"-When asked 'with what' E.J. responds 'his hand.'

"-When asked 'was it over your clothes or under your clothes' E.J. responds 'over.'

"-When Shultz asks 'how would he be touching you with his hand' E.J. responds 'straight straight and round round' and demonstrates in the air with her hand with the index finger extended (up and down while saying straight straight and in a circular motion while saying round round).

"-When asked 'how would his body be and your body be when touching you there?' E.J. indicates she doesn't understand. Shultz then brings out a male and female doll and asks E.J. to 'show me how your body would be and your dad's body would be when touching was happening.' E.J. picks up the dolls and places them sitting side by side with both facing forward, she demonstrates Father's doll putting his hand between her doll's legs, in the crotch, and moves Father's doll's arm in a circular motion and then in an up and down motion in the crotch while saying 'he used to sit next to me and he used to touch me round round (when demonstrating circular motion in crotch), straight straight (when demonstrating up and down motion in crotch).

"-Shultz then continues questioning using the drawing and when pointing to the buttocks asks 'tell me how he used to touch you on that part?' E.J. responds he 'used to pinch me and hit me' and said 'my dad said doing it because he wanted to feel it.' When asked if it was 'over the clothes' E.J. responds 'yea' while nodding head up and down.

"-Shultz turns the drawing to the front side and when pointing to the vagina area asks 'you said when he touched you there it would be over the clothes?' E.J. responds 'yea' while nodding head up and down.

"-Shultz then asks 'did your dad ever do touching to you under your clothes?[' E.J. first says 'no,' but then as Shultz[] begins asking another question, E.J. interrupts and

says 'sometimes he does, before I wake up he does that to me, one day he told me he does that to me.'

"-While pointing to the vagina area of the drawing, Shultz asks if dad 'ever did touching to you there under your clothes' and E.J. nods her head 'yes.' Shultz asks when he 'touched you there was it on the outside of your part, or the inside, or something else?' and E.J. responds, 'inside.' Schultz then asks 'how would it feel' and E.J. responds 'feel like going to hurt.'

"-While pointing to the buttocks area of the drawing, Shultz asks 'did dad touch you inside or outside or something else?' and E.J. said 'outside.'

"-In answer to other questions, E.J. says there was never touching by dad with other parts of his body, that there was no touching with mouths, and that E.J. never touched dad's body.

"-When asked if dad ever talked to her about telling or not telling about touching, E.J. responds 'said doesn't want to do it to me now and doesn't want to talk about it.' Shultz then follows up with 'doesn't want to do what to you?' E.J. says 'touch me in private area.' 'Dad said I'm sorry and I'm not going to touch you in the private area.'

'-When asked 'what parts of the house would you be in when he would touch you?' E.J. responds 'in my room and when I was coloring [asked 'coloring where?'] 'where the kitchens were.' When asked 'are there any other places in the house where he did touching to you?' E.J. shakes her head and says 'no.'

"-When asked if anyone would see when dad did touching, E.J. responds 'my mom used to see it . . . Mom tell my dad not to do that, then he said to mom, I'm not going to

do that.' In answer to follow up questions E.J. says 'mom saw it one time when over there' and that mom saw dad doing 'round round straight straight.'

"-When asked if she talked to mom 'about the stuff dad did to you?' E.J. answers 'yes' and in response to a follow-up question says she 'asked mom why didn't you ask me that before and she said 'I didn't know he was doing that to you, that's why I didn't ask you, sorry,' I said 'that's okay,[] that happened on Sunday.'

"-When asked if anyone else had touched her she says a friend but in description indicates he pinches her over the clothes on her butt.

"-When asked if she told anyone else about dad touching E.J. responds she told her mom but no one else.

"-When asked to 'tell me more about when he did touching under the clothes,', E.J. responds 'he used to look at it.'

"-After E.J. describes where she sleeps, she's asked where dad sleeps, E.J. says that they sleep in the same bed because she doesn't like to sleep alone.

"B. Father's response to the allegations.

"Father testifies that he would only touch E.J.'s private parts to clean her after diaper accidents. [R.T. 9/8/10 116:17-23] Father testified that he had a 'shortcut approach' to cleaning E.J. from accidents: 'I would just take her pants off, and then there is bathtub, I will pull faucet, the water would keep running, I would just lift her with both my hands and water would be flowing on her private area, and all the dirt - all the poops will go away, and she's clean, and then I would just lift her and dress her.' [R.T. 82:2-18] While father so testified he demonstrated lifting with both hands on each side of her body

with his arms extended in front of him, holding her into a stream of water. Father denied ever poking his finger into E.J.'s private areas. [R.T. 8/25/10 85:4-15] Father also testified that when it was time for E.J. to take showers, she would run around naked and Father would grab her and put her in the tub and E.J. found it funny. [R.T. 8/25/10 16-86:7] With regard to 'married kisses,' Father testified that E.J. had observed a couple kissing in a public place and she called it 'married kissing,' that he had never used the term. [R.T. 8/25/10 72:3-19]

"C. Additional Evidence

"Mother testified she had previously seen Father squeezing the child's buttocks and had told Father to stop, but did not think of it as sexual. [R.T. 2/11/10 48:17-22] Mother also testified she had previously sometimes observed the child pulling the maternal grandmother's sari to look at her genitals, and had seen her trying to put her fingers in the maternal grandmother's rectum, on those occasions she and grandmother had told the child 'that's not good, don't do it,' but didn't question her further. [R.T. 8/25/10 21 :13-21]

"E.J. was not subjected to a forensic examination. CPS worker Melendez indicated the child's disclosures were not of the type that would require a physical exam and that the vast majority of molested kids do not have any physical finding. [RT. 5/5/10 29:13-14, 30:20-21] Detective Jones indicated there was no forensic exam because the child did not provide enough detail in the forensic interview to indicate that something was placed inside her vagina, the exam could be very traumatic for a child of her age, and other factors such as time lag. [R.T. 7/9/09 15:24-16:13]

"Detective Jones testified that when he interviewed Nanny, she did not disclose anything of touching, it was more consistent with the child running around naked and touching herself, but no disclosure about anyone inappropriately touching her for sexual gratification. [R.T. 7/9/09 23:7-11, 26:17-27] Nanny also did not disclose that the child tried to 'see' her private areas, but would touch her and Nanny would tell her to stop. [R.T. 7/9/09 24:20-27] Detective Jones did not interview Nanny in person but instead by phone from Canada on 5/8/09. [R.T. 7/9/09 25:18-26:1]

"Detective Jones testified that he had reviewed the report of CPS worker Melendez and had concern about one question that he felt was leading. The question was in essence 'that's not what I heard, tell me who touched your privates.' His concern was that a leading question to a five year old 'may or may not bring about the truth . . . usually a child does not want to disappoint an adult . . . so if you ask a leading question to a child to obtain an answer, it may or may not be truthful[.]' [RT. 7/9/09 17:8-18:15, 19:22-20:16] Forensic Interviewer Shultz also testified that it is recommended to use narrative, open-ended questions, and not leading questions of a child of E.J.'s age because the child 'could possibly be influenced by an adult.' [R.T. 2/10/10 21:8-22:12] Ms. Shultz was not asked her opinion of the particular question asked by CPS Worker Melendez.

"Detective Jones testified when he interviewed Father, Father indicated he would touch E.J.'s vagina and anus when she would spoil her pants, or didn't clean herself appropriately, and Father would clean those areas. [R.T. 7/9/09 38:8-20] Detective Jones also testified it was unusual for a suspect who has retained an attorney to agree to talk to the investigator[.] [R.T. 7/9/09 23:23-24: 17] Detective Jones believed Father

was cooperative and described him as emotional during the interview, breaking down and crying. [R.T. 7/9/09 38:23-27]

"Lillian Rodriguez, MSW, Counselor, Superior Court Family Court Services, testified that she prepared two reports in the matter primarily relying on information from other professionals. Both of FCS Counselor Rodriguez's reports were entered into evidence without objection. [Exhibits N-1 and N-2]. FCS Counselor Rodriguez testified that in the April 30, 2010 interview with the parents, she did not recall Mother telling her about vaginal or anal penetration. [R.T. 2/11/10 15:3-4, 17:12-15] The pertinent portion of the May 1, 2010 FCS Report reads: 'According to the mother, on April 19, 2009 [sic] the nanny told her that the child had been observed touching herself and making attempts to see the nanny's private area. *The child told the mother that about her father's actions and the mother called the police.*' [Ex. N-1, pg. 2, para. 4, emphasis added] The italicized language appears to inadvertently omit what the child told mother as to what father's actions were. There was no testimony to clarify this.

"The FCS report of July 2, 2009, includes information from the child's therapist, Carol Kesten-Selhay, MFT.^[8] The therapist related to FCS Counselor Rodriguez that E.J. was 'talking about abuse through artwork, using dolls, and talking . . . the child talked about the father putting his arm and touching her private areas under her panties and it

⁸ The SOD notes that the child's therapist was called as a witness by mother, but both minor's counsel and the therapist asserted the child's psychotherapist-patient privilege and thus the therapist did not testify. However, with respect to information in the therapist's report, discussed *post*, the court ruled the therapist had waived the privilege and noted, in any event, that minor's counsel (the holder of the privilege for the child) did not assert the privilege to retract the disclosed information.

making her cry . . . the child spoke of the father telling her not to tell.' [Ex. N-2, pg. 4, para. 3] The therapist also told Ms. Rodriguez that the child had not expressed fear of Father. [*Id.* pg. 4, para. 2 and 3] Ms. Rodriguez testified that the therapist did not indicate whether she believed the sexual abuse had or had not occurred. [R.T. 2/11/10 24:28-25:8]

"1. Dispute as to Potty Training

"There was dispute on the issue of when E.J. became potty trained. Mother testified E.J. was potty trained when approximately two, before the parents separated [2/06]. [R.T. 10/8/10 38:17 -19] Melissa Murphy, the Carlsbad preschool director where the child attended starting in early 2006, and who had direct observation and memory of E.J. in their two year old class (Murphy's own child was in the class and she regularly observed the class both as part of her duties and when visiting her child), testified E.J. was 'advanced in all aspects,' that she was not diapered at nap time, had daytime control of her bladder and was potty trained while at school. Ms. Murphy indicated she couldn't offer an opinion of whether she was potty trained at night since she had no observation of that. [See generally R.T. 10/8/10 pg's 8-18] Mother testified that when E.J. was in The Gifted Preschool (a different school from above) from September 2006 until January 2007, which charged a fee if they had to change a child's diaper, she was never charged a diapering fee, and made an offer of proof, that was stipulated to, that the receipts from the school so indicated. [R.T. 10/8/10 40:11-28] Father testified E.J. was not potty trained until approximately 3 1/2 to 4, and was in transition prior to that where she would have accidents [R.T. 8/28/10 81:20.-26], that when the child was 2 she was working towards

potty training but wasn't completely potty trained. [R.T. 9/8/10 134:2-19] Father also pointed out that he had filed a declaration 11/3/06 stating that the child was not potty trained at night (complaining about Mother putting diapers on E.J., instead of training her). [R.T. 9/8/10 135:9-11; 10/8/10 20:14-23:6]. Father also produced a Costco receipt for a diaper purchase ('boy's pull-ups') by him in April 2007. [R.T. 10/8/10 25:3-10] Mother was cross-examined as to receipts for diaper purchases from Costco (bulk packages) after 9/06 but testified she didn't specifically recall the purchases and had allowed a friend who runs a child daycare to use her Costco card to make purchases. [R.T. 10/8/10 45:24-48:25]

"2. Domestic Violence Allegations

"There was evidence presented with regard to allegations by Mother of domestic abuse by Father during the marriage. (Mother had initially volunteered the information in response to a question that did not specifically call for such a response.) Mother made specific allegations with regard to an incident in 2005, among others, that Father denied. Examination was allowed as Father alleged it was relevant to Mother's credibility, or lack thereof, which was central to Father's case. Cross-examination included Mother's failure to mention, and in fact denial of domestic abuse, subsequent to the alleged abuse, in contacts with the police and CPS (in relation to an incident in May 2006 involving child custody, shortly after the parties separated). When Mother was interviewed by CPS worker Melendez on April 21, 2009, Mother made allegations regarding the prior domestic violence by Father, however, when Mother and Father met with Family Court Services mediator Rodriguez on April 30, 2009, per the FCS report of May 1, 2009,

[Exhibit N-1] neither parent related any concerns regarding domestic violence. [See R.T. 2/10/10 85:10-17; 2/11/10 20:12-26; 4/7/10 20:22-21:23, 40:17-47:28; 8/25/10 64:26-65:24]

"Mother testified that although there were numerous events of domestic violence and she in fact had called the police twice, she told the officers to let Father go, that she 'did not have the strength to stand for myself . . . and never came to court for that matter. . . . I cannot tolerate abuse of my child, no matter how much I tolerated it on myself.' [R.T. 4/7/10 20:25-21:23]

Mother's treating psychologist, Dr. Stephen Doyne, PhD was allowed to testify as to Mother's statements in therapy with regard to domestic violence allegations as prior consistent statements by Mother, and in rebuttal to claims she had not previously raised the allegations. Mother waived the psychotherapist-patient privilege as to that subject. Dr. Doyne testified that in two sessions in February 2007, Mother related in detail specific instances of prior domestic violence. [D.T. 7/14/10 10:23-15:9] Dr. Doyne described Mother's affect when relating these episodes as 'consistently tearful, anxious, distressed' which are symptoms frequently observed in victims of domestic violence who have post-traumatic syndrome. Dr. Doyne described Mother as struggling between reporting the incidents, being in fear of more harm, and not wanting her husband to go to jail, and that such vacillating is consistent with domestic violence victims he's observed in 30 years of practice. Dr. Doyne found Mother to be credible in her reports, that in his clinical opinion he believed her representations of an abusive relationship. [R.T. 7/14/10 21:5-22:4, 22:17-19]

"3. May 2006 Child Custody Incident

"Mother testified that in 2006 Father had broken a window to enter her residence to abduct the child. The parents testified the Father moved out of the marital residence at the end of April 2006. The parents did not have a child custody/visitation order in place. Mother testified that as of May 2006, she had changed the locks. On May 3, 2006, Father sent an e-mail to Mother saying he wanted to come by to see E.J. and to discuss visitation timeshare, however prior to his arrival Mother sent an e-mail to Father saying he should not come. Father, who worked in the Los Angeles area, apparently did not get the e-mail since he was driving between Los Angeles and San Diego when it was sent. When Father arrived at Mother's residence, Mother was not home but E.J. and her sitter were. Father found that the locks had been changed, went to the backyard and saw the sitter through the sliding glass door who let him in. After he had entered the sitter informed him Mother had instructed her not to let Father in. Father testified that because he did not want the sitter to get in trouble, he staged it to look like he had entered through a window by removing a screen and telling the sitter to tell Mother that was how he entered. When Mother returned home from work she found Father in the residence, with the screen removed and was told by the sitter Father had entered through the window. Father was carrying E.J. Mother told Father to leave, he went outside still carrying the child and Mother called 911. The police contacted Mother and Father outside of the residence. Per Mother, she told the police she did not want Father arrested, she just didn't want him to leave with the child. This incident resulted in an investigation by CPS against *both*

parents (apparently reported by the police to CPS). [R.T. 9/8/10 76:6-81:18, 91:3-93:11, 138:22-141:24]

"4. Expert Testimony

"Father retained Dr. Raymond Murphy, PhD, to conduct a psycho-sexual evaluation. Dr. Murphy testified as to the various psychological tests administered, including the Abel test (conducted by 'a person who administers it') and gave an opinion that he did not see Father as sexually deviant and saw no pedophilia tendencies.^[9] Dr. Murphy also gave recommendations as to what steps would be appropriate for reunification of Father and child. [R.T. 7/9/09 43:16-69:16] Mother objected to the introduction of evidence of the Abel test [discussed below]. However Dr. Murphy did specifically testify that 'the whole area of assessing the allegations rests with the authorities, not with therapists and evaluators *My job is not to determine whether or not sexual abuse occurred* That's CPS, and the police and forensic interviewers and forensic examiners' [R.T. 7/9/09 66:18-25, emphasis added]

"On cross-examination, and through her rebuttal expert, Dr. Robert Simon, PhD., Mother brought out that several of the tests used by Dr. Murphy were not the current versions of such tests, that on some tests Dr. Murphy used shortened versions, and in test results Dr. Murphy did not indicate the standard error deviation, even where the results were close to cut off points, and that Dr. Murphy did not have the benefit (as it was unavailable at the time of his evaluation) of collateral information such as the CPS

⁹ The court noted that the "Abel test" referred to the Abel Assessment of Sexual Interest.

reports, the forensic interview, and interviewed only Father. Dr. Simon also testified it was contrary to their professional's ethical guidelines to offer child custody and visitation recommendations without interviewing all parties involved. [R.T. 11/4/09 14:19-100:18; 9/8/10 2:21-71:26; 9/15/10 3:3-60:11]

"Evidence of the Abel test was objected to by Mother, citing the case of *Ready v Commonwealth* 824 N.E.2d 474 (2005) which excluded the test. In *Ready* the trial court excluded the evidence, finding problems with its scientific validity and relevance to the case. In particular the appellate court found there was not credible evidence of acceptance in the scientific community and a failure to demonstrate the test's reliability. Dr. Murphy did testify that the Abel test is 'the best of all tests' with regard to sexual deviance, that it has 'the best research conducted on it,' and that it is recognized and accepted within the community of forensic psychologists, that 'it is the preeminent test at this point.' Dr. Simon (Mother's rebuttal expert) testified that the Abel test is 'commonly used' in doing sexual deviance evaluations, that it wasn't developed as a diagnostic tool, but as a treatment tool, to assess and monitor progress in treatment for a sexually related problem[], but is often used as part of a battery [of tests] diagnostically. [R.T. 9/8/10 55:11-18] Dr. Simon also testified the Abel test [generally] meets forensic criteria. [R.T. 9/8/10 56:25-26] Dr. Simon offered no evaluation of the validity of how the test was administered to Father (nor could he, since there was no evidence in Dr. Murphy's file or testimony as to how it was administered for Dr. Simon to evaluate).

"Dr. Murphy does not administer the test himself, but has a professional who is an expert in that area apply it. [R.T. 7/9/09 53:20-21; 11/4/09 63:16-24] Dr. Murphy also

testified the test has 'validity scales' built into it, however his description of the scales relate to whether there is underlying deception in the persons' perceptions of himself (cognitive distortion, social desirability, expression management) [R.T. 7/9/09 64:6-27], but Dr. Murphy's testimony did not reference validity in the way the test was procedurally administered, other than saying he had an expert in the area administer it. When Dr. Murphy is asked how the results of the Abel test are scored, Dr. Murphy responds 'he's not exactly sure how it works' just that the person who administers it 'gets results back based on the proprietary guidelines of Abel.' [R.T. 11/4/09 93:1-6] Dr. Murphy did not receive the computer print out of the Abel results, but rather relied on a phone call from the person who administered the test. [R.T. 11/4/09 60:3-6, 65:11-23]

"Dr. Murphy also testified 'testing is not a litmus test . . . it[']s looking at tendencies . . . orientation . . . the predispositions of individuals.' [R.T. 7/9/09 51:6-12, 53:7-16]

"III

"DISCUSSION

"A. Analysis Standard

"As a hearing on child custody where the existing order is joint legal and physical custody, the court utilizes the Child's Best Interest standard (Family Code 3011, 3020) in its analysis and in particular, under the circumstances of an alleged sexual molest, the child's health, safety, and welfare, which controls over all other policies. (Family Code 3011(a), 3020(a)(c).) In that Mother has raised the allegations of sexual molest and seeks

to modify the existing order, Mother has the burden of proof by a preponderance of the evidence to show the alleged act or acts occurred.

"The two relevant sections that define sexual abuse are Penal Code section[s] 288(a) and 11165.1(b)(4). Penal Code section 288(a) defines a lewd act upon a child as 'Any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body . . . of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person' Penal Code section 11165.1(b)(4) defines sexual abuse as 'The intentional touching of the genitals or intimate parts (including . . . genital area, . . . and buttocks) or the clothing covering them, of a child . . . for the purposes of sexual arousal or gratification, except that it does not include acts which may reasonably be construed to be normal caretaker responsibilities'

"B. Did the Evidence Establish by a Preponderance that Sexual Abuse Occurred?

"There are four primary sources of information with regard to the alleged abuse: Nanny, Mother, CPS worker Melendez, and the forensic interview.

"Nanny did not testify, leaving for Canada shortly after the allegations arose, and apparently not returning. Mother, Detective Jones, and CPS worker Melendez all related information obtained from Nanny. There are discrepancies in what Nanny said, however independent investigators (Melendez and/or Jones) obtained the following information: that while undressed for bathing[,] E.J. would touch her own genitals and that she would lay on her back and front and expose her genitals, that she would touch Nanny's genitals,

that she told Nanny that Daddy is the one who plays with her that way, and E.J. said not to tell her mom. Mother also testified Nanny told her the above, but additionally told her that E.J. indicated Father digitally penetrated her. Both Jones and Melendez testified that Nanny did not tell them of digital penetration by Father. Melendez indicated she did not ask Nanny if he had.

"Mother testified as to her conversations with E.J. In essence, Mother testified that E.J. told her that Daddy touched her in the private areas, that he looks at her vagina and tells her she is beautiful there, that he put his finger in her rectum, and squeezes her buttocks. Mother also testified that when she asked E.J. what daddy does in the private area, E.J. demonstrated pressing a finger inside her vagina (it wasn't specified but it appears the demonstration was outside her clothes) and turning it around.

"CPS worker Melendez testified that when she interviewed E.J., she initially denied being touched in her private areas, but that the manner of her response was significantly different from her other responses and indicated to Melendez 'there was something there.' Melendez then asked 'Geez, that's kind of weird, because I could have sworn that somebody told me that somebody did touch your privates' to which E.J. responded '*my daddy*' [italics added].

"The forensic interview contains E.J.'s statements and demonstrative conduct as noted above. Particularly pertinent information includes: 'My dad touches me in the front private area'; the touching occurred on 'more than one day'; the touching started when she was '3 and one half' and the last occurred she was, after a pause 'four'; the touching occurred at her dad's house 'after he moved out,' would be after he would pick

her up from school, and occurred in her room or the kitchen (where she colors); he used to touch her 'over and over again and after he stopped doing that he said going to give me a married kiss'; she described the touching of her vagina as 'round round and straight straight' with 'his hand,' that was it 'over' her clothes; she again describes the touching of her vagina as 'straight straight and round round' and demonstrates in the air with her hand with the index finger extended; on an anatomically correct drawing E.J. points to the vagina and buttocks when asked 'your dad touches you where?', E.J. demonstrates with male and female dolls that when the touching was occurring Father and E.J. were sitting side by side with both facing forward, Father would put his hand between her legs, in the crotch, and move his arm in a circular motion doing 'round round' and then in an up and down motion doing 'straight straight' in the crotch; E.J. says the touching of both her buttocks and vagina was over her clothes; when asked 'did your dad ever do touching to you under your clothes?' E.J. first says 'no,' but then as Shultz[] begins asking another question, E.J. interrupts and says 'sometimes he does . . . before I wake up he does that to me . . . one day he told me he does that to me'; when asked if dad 'ever did touching to you there [vagina] under your clothes' E.J. nods her head 'yes' and indicates 'inside' of her part, and indicates it would 'feel like going to hurt'; as to her buttocks area E.J. said the touching was 'outside' the part; E.J. related there was never touching by dad with other parts of his body, that there was no touching with mouths, and that E.J. never touched dad's body; E.J. also said 'my mom used to see it . . . Mom tell my dad not to do that, then he said to mom, I'm not going to do that,' that 'mom saw it one time' and that mom saw dad doing 'round round straight straight.'

"Several issues were raised as to the credibility of certain portions of the evidence. The issues included Mother's credibility, the leading question asked by CPS worker Melendez, the validity of the information from Nanny due to the discrepancies, and the affect Mother, Nanny, or Melendez, may have had on the information disclosed in the forensic interview, or that innocent actions were misconstrued or misreclected by the child. All parties agreed that the forensic interview itself was conducted in a manner that would not taint the evidence. Father argued instead it was these other factors, and in particular the interactions that occurred between April 1 and April 29, that influenced the information from the forensic interview.

"1. Mother's Credibility

"Father's position is that Mother has orchestrated or at least influenced the sexual abuse allegations to forestall Father's custody.

"Father points to the suspect timing of the allegations, being raised immediately after Father sought to enforce his vacation timeshare to be allowed to take E.J. to Europe, that Mother had previously sought to interfere with Father's visitation by calling the police and alleging father was trying to abduct the child in the May 2006 incident, that Mother made false accusations of domestic violence to influence child custody, and that Mother's statements about what she was told by Nanny varied during her testimony.

"The court finds that Mother is credible. The court observed Mother's testimony and her demeanor throughout the trial which significantly led to this conclusion. Also of substantial significance to the court was CPS worker Melendez's testimony regarding Mother's demeanor upon first contact and subsequently at court when seeking the TRO.

Melendez's testimony indicated that in the first contact on April 21, Mother 'basically brushed [Melendez] off', and subsequently downplayed the allegations by (in essence) indicating she wasn't sure if there was anything there, that she couldn't believe it had occurred, and that she didn't want to change the current 50/50 custody. Melendez's testimony of Mother's demeanor the following day at court, *after* Melendez had indicated to Mother what E.J. was disclosing, was that Mother was very self-deprecating (she was a terrible mother, she should have known), and physically appeared to be in a 'state of shock,' was pale, shaking, and tears went down her face on and off for hours.

"The evidence that Mother allowed Father to have visitation after the Nanny initially disclosed the allegations, and did not mention it in her filed response to Father's OSC regarding vacation, does not have significant weight to the court. Mother testified she didn't want to believe the allegations during this time, which is supported by Melendez's observations noted above. Taken with the above findings, that Mother did not include the allegations in her response to Father's OSC regarding vacation signed the day before she sought the TRO, highlights that Mother was unsure of the allegations at that time, and that she was not using them as a ploy to deny Father's vacation, for if that were her intent, one would expect that she would have included them in the response.

"As to the timing, the court notes Mother testified Nanny did not disclose the allegations until April 14, 2009. Three investigators, the initial sheriff's deputy, detective Jones, and CPS Worker Melendez, all talked with Nanny and, although there are discrepancies in what Nanny stated, it cannot be reasonably disputed that she made

allegations that could be construed as sexual molest to the various investigators (except Detective Jones).

"The court does not find that Mother's claims of domestic violence were made to influence child custody. The court notes the allegations were disclosed to her therapist in February 2007, two years *before* the current dispute, and two months *after* the parties had reached an *agreement* for 50/50 joint custody, and were not subsequently used to influence custody as no OSC's were filed to modify custody until the present matter.

"Likewise, the court does not find that the May 2006 incident shows Mother has a pattern of trying to involve law enforcement to influence child custody. Father had just moved out and the parents did not have a child custody agreement. It is the court's experience that it is not uncommon for parents to be distrustful with one another regarding child custody during this initial period. In this instance, from *Mother's* state of mind, she came home to find Father inside her residence, knowing that she had told him not to come in an e-mail (she didn't know he hadn't received it), knowing that she had changed the locks and instructed the sitter not to let him in, and seeing a window screen removed with the sitter telling her Father had taken the screen off to enter (the scenario Father set up so the sitter wouldn't get in trouble), and thereafter the parents arguing over child custody. Under those circumstances it would certainly be reasonable for anyone to involve law enforcement.

"In view of the above, to the extent there are discrepancies in the testimony of Mother as to what Nanny told her, or what E.J. told her, or its timing, the court finds such discrepancies are explained by Mother's shock as to what she was being told and her

emotional upheaval at the time, the passage of time, the passage of time between her cross-examination (February 2010) and direct testimony (August 2010), and innocent misrecollection and attempts to recall conversations, and not demonstrating an intent by Mother to manufacture evidence.

"The court finds that Mother did not orchestrate or intentionally influence the sexual abuse allegations to forestall Father's custody.

"2. Nanny

"There are discrepancies in what was reported by Nanny as noted above. Both Mother and CPS worker Melendez testified Nanny related E.J. would touch her own genitals, that she would lay on her back and front and expose her genitals, and that she would touch Nanny's genitals, and that she related that Father would touch or play with her that way. The primary discrepancy is whether Nanny also related that E.J. said that Father would put his finger in her rectum and vagina, only Mother so testifying. The court notes that Mother and Nanny spoke face to face in Hindi, their native language, whereas Jones and Melendez only spoke to Nanny over the phone, and Melendez indicated language difficulties. The court believes this affected the information obtained by Melendez and Jones.

"3. Were E.J.'s statements in the forensic interview influenced by others?

"The court has reviewed the forensic interview to determine whether it appears E.J.'s statements were influenced as Father argues. Father argues that the statements made by E.J. at the beginning of the interview, where Ms. Shultz was asking about the parents' divorce, show that she had constructive recollection rather than independent

recollection because the statements are not the type of information a two and a half year old (E.J.'s age at the time of separation) would recollect on their own. In particular Father argued that the statements 'mom and dad got divorced . . . they were not getting along' 'dad got money from mom' 'dad left my mom and me all alone' 'mom and me were put out with little clothing' showed E.J. had constructive recollection. Some of these statements clearly are the result of information told to E.J. i.e. 'mom and dad got divorced . . . they weren't getting along,' and 'dad got money (the actual statement was 'a little money') from mom.' The first two of these statements are what a parent would tell a child as to why mom and dad weren't living together. Neither of these statements suggests trying to influence a child, just explain the circumstances in a neutral fashion. The third statement 'dad got a little money from mom' would not be appropriate to tell a child, but the fact that 'a little money' was specified indicates to the court there was no significant attempt to influence the child against Father. The statement 'dad left my mom and me all alone' expresses the type of emotion a young child likely would feel when a parent moves out, here Father, and the court feels is the child's own interpretation. The last statement that 'mom and me were put out with little clothing' actually was prefaced by E.J. saying this was the paternal grandmother who did this, not Father, and therefore not related to the divorce. No information was presented to indicate the validity or background of this statement so the court can draw no conclusion as to it. In view of the court's finding that Mother was credible and did not attempt to improperly influence the investigation, the court does not find that any of these statements support the inference Mother was creating recollections in E.J. with regard to the sexual abuse allegations.

"Father also argues that Nanny, Mother, and CPS worker Melendez asking E.J. about touching of her privates conditioned her, whether unintentionally or intentionally, to make the statements she did in the forensic interview indicating that Father touched her privates.

"As to the leading question asked by CPS worker Melendez, the court notes that this question was only asked after the child's demeanor significantly changed when asked if anyone had touched her private areas, leading Melendez to believe 'there was something there.' In view of the serious nature of the allegations, and the significant change in demeanor, it was appropriate for Melendez to probe further. Melendez's follow up question that 'somebody told me that somebody did touch your privates,' was leading that someone had touched her privates, but was not leading as to who touched her privates, and E.J.'s response of 'my daddy' could not reasonably be construed as prompted by the question.^[10]

"Nanny, per Mother's testimony, had tried to talk to E.J. several times about behaving sexually and finally the child disclosed her daddy 'does those to her.' In another portion of Mother's testimony she indicated Nanny said E.J. disclosed this when Nanny

¹⁰ "The court notes that there is no record or testimony of what was asked and disclosed in Melendez's second interview of E.J. It was argued by Father exculpatory statements could have been gathered in this second interview and suppressed by Melendez. Although the court believes this interview should have been noted in her report, there is no evidence to suggest Melendez would attempt to improperly influence the investigation, the court presumes she would properly perform her duties (Evidence Code 664), and the court will not speculate as to what may or may not have been said. Based upon the evidence presented, and the court's observation of Ms. Melendez while she testified, it does not find that her investigation was biased."

asked E.J. 'why do you do that [when she was behaving sexually]?' Mother also testified that Nanny told her Nanny had been questioning the child and attempting to get information for awhile, that the child would not answer and would cry, but finally answered that it was Father who 'tells me this.' This apparently occurred in early April, with the disclosure about Father occurring on April 14. The specific question attributed to Nanny above would not condition E.J. to respond in any particular manner and is not a leading question, but, although there is no direct evidence of this, it is conceivable that Nanny did ask leading questions as she was attempting to get information.

"Mother testified that when she first talked to E.J., occurring on April 19, she asked if daddy had touched or played with her the way Nanny had described and E.J. responded yes and described what he did. Later on April 19 Mother testified how E.J. demonstrated how she was touched. The court infers from the context it was in response to a question of in essence of 'how does daddy touch you?' Mother also testified she had two other conversations with E.J. on April 20 where E.J. described actions of Father. Again, the court infers it was in response to a question of in essence of 'how does daddy touch you?' Mother also testified as to a fifth conversation she had with E.J. on April 21, after CPS had interviewed E.J., where Mother asked 'tell me what else daddy does with private area' and E.J. responded by demonstrating. Mother had additional conversations with E.J., although she testified most occurred after E.J. began therapy, after the forensic interview. Mother did not have recollection of the specific conversations. Mother's questions to E.J. were leading, and created a *possibility* of influencing E.J.

"The problem with leading questions is, as Detective Jones testified, they "*may or may not* bring about truth' and, as Forensic Interviewer Shultz testified, [their] use on a child could cause responses that 'could *possibly* be influenced by an adult.' Put another way, it may influence the truth, but not necessarily so, nor does the testimony of Jones or Schultz indicate that it is *more likely* to do so. In this instance, the leading questions were such that *if* they influenced E.J.'s statements, they would have influenced them to the extent of identifying Father as the one who touched her private parts. But Father does not dispute this, he told Detective Jones he would touch E.J.'s vagina and anus when she would spoil her pants or not clean herself appropriately. Father also testified as to the manner in which he would clean E.J. when she had accidents. Further, there is absolutely no evidence that anyone else touched E.J.'s private areas, so it does not appear the leading questions influenced E.J.'s statements in the forensic interview to the effect Father touched her private parts.

"The questions from CPS worker Melendez, Nanny, and Mother, also do not appear to be likely to influence E.J.'s descriptions of the touching. Melendez's questions did not describe any acts, Nanny was asking questions about acts she was observing by E.J., not suggesting acts to her, and Mother's questions were for the most part in essence tell me what daddy does with your privates. The only exception would be [where] mother indicates in her initial questions to E.J. she asked if Father did the acts Nanny described, inferring that she was describing the acts.

"After reviewing the forensic interview, the court does not feel mother's questions influenced E.J.'s description of the touching. In particular, the court relied on E.J.'s

demonstration of how the touching occurred, which was much more detailed than the simple description she gave of 'round round straight straight' and was not included in any of the descriptions given by Mother. The court believes that unless E.J. was coached, and the court does not believe this as discussed with regard to Mother's credibility, the demonstration was based upon E.J.'s memory. The court believes that although simple words could be inadvertently planted into a child's mind, the information processing necessary for a demonstration would not likely be implanted without a conscious attempt to do so. The court therefore does find that the descriptions and demonstrations given in the forensic interview are reliable, with certain limitations.

"There are inconsistencies between some of E.J.'s statements in the forensic interview and the known facts. For instance E.J. states that no one other than her parents and grandmother take care of her, but it is known she has had at least three nannies. She also says she has told no one else about Father's touching of her privates except for Mom, yet she talked with CPS worker Melendez, and Nanny. She also relates that Mother saw Father touching her one time doing round round straight straight and told him to stop. Some of these inconsistencies have potential explanations. Although she had three nannies, two were of very short duration, Nanny was only for two - three weeks and half of that time E.J. would have been with Father, and Father only had a nanny for a very short time before deciding he could work at home when he cared for her, so E.J. may not have considered either of these two as caring for her. Her relating that Mother saw Father touching her privates and telling him to stop is likely confusion with the times

when Father would squeeze E.J.[']s] buttocks and Mother would tell him to stop.

However, in its evaluation the court does consider these inconsistencies.

"4. Was the touching in the act of normal caretaker responsibilities, or for sexual gratification?

"The touching of the genitals or clothing covering them would not be considered sexual abuse of a child if construed as normal caretaker responsibilities. Penal Code section 11165.1(b)(4).

"Father claims that the touching occurred in the context of his cleaning accidents E.J. had when she was in the process of potty training. E.J. described the time frame for the touching as starting at three and a half with the last time occurring when she was four. She also related the touching was after Father moved out. The court does not feel that a child of this age has an accurate concept of time other than being acutely aware of their current age and the recent past. Since E.J. was a couple of months past five at the time of the interview, the court believes the last touching had been some time prior to E.J. turning five.

"The parties' dispute as to when E.J. became potty trained. Mother claiming it was at about the time Father moved out in April 2006 when E.J. was two and Father claiming she wasn't fully potty trained until between three and half and four (mirroring E.J.'s statement of when the touching occurred). Mother presented credible evidence (the pre-school director and school records) that E.J. was potty trained for daytime purposes as of early 2006, when E.J. was two. It also appears to the court that E.J. still had night time issues into late 2006 and early 2007 (Father's declaration filed November 3, 2006, which

specifies she is potty trained during the day, not at night, [page 2/10, bottom paragraph] and his receipt for the purchase of diapers in April 2007) when E.J. was three.

"Father went into great detail regarding the unusual manner in which he cleaned E.J. when she had accidents. **What is critical to the court, is that Father's description is not in any way similar to the touching E.J. demonstrated and described in the forensic interview.** Father described and demonstrated holding E.J. by her sides and putting her in front of him into a running stream of water to clean her in the bathtub. E.J. demonstrated, using the dolls, that the touching occurred when E.J. and Father were sitting side by side, with Father putting his hand into her crotch and making up and down and circular motions with absolutely no reference about being put into a stream of water. Father indicated the touching occurred in the bathroom (bathtub), but E.J. said the touching occurred in her room or when she was coloring in the kitchen, without reference to it occurring in the bathroom, and expressly saying there were no other places in the house where it occurred. E.J. also described the touching as occurring over her clothes (the only time she described touching under the clothes in the forensic interview was within the context of relating 'sometimes he does, before I wake up he does that to me, one day he told me he does that to me,'¹¹) which could not be interpreted as occurring for cleaning purposes. In addition, E.J. 's description of some of the touching occurring when she was coloring in the kitchen, when even Father acknowledged in his November

¹¹ The court noted that statement "clearly is not an independent recollection of the touching, and appears to the court to be in line with cleaning her after an accident that occurred while she is asleep."

3, 2006 declaration, and the evidence from the preschools, was that E.J. was potty trained while awake when she was two, would not be at a time E.J. would have accidents, if she did. Therefore, the court finds that the touching as described by E.J. in the forensic interview was not for normal caretaker responsibilities.

"The court cannot reasonably fathom a reason a child would have their genitals, or the clothes immediately over them touched and rubbed in a circular and up and down motion, if it is not for cleaning purposes, except for sexual purposes, and the court believes it is a reasonable inference to draw from such conduct absent a legitimate explanation.

"5. Affect of Expert Evidence

"Dr. Murphy testified as to his opinion that based upon his evaluation, he did not see Father as sexually deviant or with pedophilia tendencies. In the court's observation of Dr. Murphy's testimony, it appeared a significant factor in this evaluation was the Abel test result. Mother objected to the introduction of this evidence.

"Mother cited the case of *Ready v Commonwealth* 824 N.E.2d 474 (2005) which excluded the test.^[12] In *Ready*, an admitted and twice convicted pedophile sought to introduce [favorable] evidence of his Abel test results in a civil commitment hearing. The trial court excluded the evidence, finding problems with its scientific validity and relevance to the case. The appellate court found there was not credible evidence of acceptance in the scientific community and a failure to demonstrate the test's reliability.

¹² "The court is unaware of any California case that addresses the admissibility of the Abel test."

The court's review of the evidence here is that both Dr. Murphy (Father's expert) and Dr. Simon (Mother's rebuttal expert) in essence testified that the test was recognized and used by professionals in the field for sexual deviance evaluations, therefore the first prong of the *Kelly* test (*People v Kelly* 17 Cal.3d 24 (1976)), that of acceptance in the scientific community, was met. However, the court's review of the evidence did not disclose any testimony as to the second prong of the *Kelly* test, whether the test, as administered to Father, was done in the manner approved by the scientific community. The test therefore would not be admissible under *Kelly*.

"In addition, the court, as it disclosed to the parties and gave them the opportunity to respond in writing, evaluated the Abel test's admissibility under Evidence Code section 1101(a) which bars 'evidence of a person's character or a trait of his or her character . . . when offered to prove his or her conduct on a specified occasion.' Character is a person's 'propensity or disposition to engage in a certain type of conduct' (Evid. Code 1101, Law Revision Commission Comments). Dr. Murphy testified that '[psychological] testing . . . [is] looking at tendencies . . . orientation . . . the predispositions of individuals' and therefore clearly character evidence. The exception under Evid. Code 1101(b) would not apply since that only allows evidence that a person committed a crime, civil wrong, or other *act* when relevant to prove some fact such as motive or intent, here the proffered evidence of the psychological testing results is not a crime, civil wrong, or other act. The court would exclude the test per Evid. Code 1101(a).

"Further, even if all of Dr. Murphy's opinions and the basis thereof, including Able, were admitted, the court finds they are of little weight in its evaluation. The court

finds that the validity issues with Dr. Murphy's evaluation and testing¹³, raised on cross-examination and through the testimony of Dr. Simon, compromise the weight it could be given. Finally, even Dr. Murphy acknowledged his evaluation was not to determine whether sexual abuse occurred[, inasmuch as] 'the whole area of assessing the allegations rests with the authorities, not with therapists and evaluators *My job is not to determine whether or not sexual abuse occurred.*'

"The court also gives Dr. Murphy's recommendation for a reunification process little weight, for the same validity issues raised as to the evaluation and testing (see FN [13, *ante*]) and additionally that Dr. Murphy does not have sufficient information to evaluate the best interests of E.J. since he did not evaluate either Mother or E.J.

"C. Conclusion and Disposition

"For the forgoing reasons, the court does find that Mother has met her burden of proof to show by a preponderance of the evidence that sexual abuse of E.J. by Father occurred. In particular, the court finds the sexual abuse was the touching over the clothes of E.J.'s genitals in the manner she described in her forensic interview which the court finds were not for caretaker responsibilities. The court does not find the burden of proof has been met to show digital penetration of the genitals, based upon the lack of specificity in E.J.'s forensic interview on this subject. The court notes it is an extremely close question as to whether abuse occurred, the court has doubts, has reasonable doubts, and

¹³ The court noted these validity issues included the "[f]ailure to use most current variations of tests, [the] use of shortened versions of tests, [the] failure to address standard error deviation, [and the] lack of availability of collateral information (CPS reports, forensic interview, interviewing only Father)."

could not make a finding based upon clear and convincing evidence, but those are not the standards of proof, the standard is by a preponderance, whether it is more likely than not, and the court so finds after an evaluation of all the evidence. [¶] . . . [¶]

"The court orders [in part] as follows:

"1. Mother is to have sole legal and physical custody of E.J. and Father is to have no visitation or contact at present;

"2. The child is to continue in therapy with her licensed therapist until released by the therapist;

"3. Father is to obtain counseling with a licensed therapist to address the issues raised in this opinion; [and]

"4. Minor's Counsel is to confer with E.J.'s therapist to determine if the therapist would recommend any type of contact between E.J. and Father at this time" (Fns. omitted with the exception of fns. [4], [5], [6], [7], [10], [11] and [13].)

DISCUSSION

A. *Overview*

In evaluating father's claims of evidentiary error we note that at its core his appeal challenges the sufficiency of the evidence in the record to support the finding by the trial court that he sexually abused E.J. within the meaning of Penal Code sections 228,

subdivision (a) and 11165.1, subdivision (b)(4).¹⁴ Indeed, although father argues that two evidentiary errors changed the outcome of the case (e.g., the exclusion of the Abel test and the admission of "expert" testimony by mother's therapist), in reviewing his briefing we note that his challenge to the evidence and the inferences to be drawn from it actually go much further.

Specifically, father (i) challenges what he calls the "tainted" Melendez interview, when Melendez made a leading statement that allegedly "steered E.J. toward a particular response" and thus affected the outcome of the hearing; (ii) contends nanny provided "wildly different accounts" of E.J.'s inappropriate behavior and if he had been able to cross-examine nanny in court, depose her or even question nanny informally, she "perhaps could have resolved these discrepancies" in his favor; and (iii) also contends there are a "number of reasons" to question mother's credibility and that had the "expert" testimony of Dr. Doyme been excluded, "it is likely that the trial court would not have deemed her credible and would have issued a decision more favorable to [f]ather."

¹⁴ Penal Code section 288, subdivision (a) provides in part: "[A]ny person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years." Penal Code section 11165.1, subdivision (b) provides: "Conduct described as 'sexual assault' includes, but is not limited to . . . (4) The intentional touching of the genitals or intimate parts (including the breasts, genital area, groin, inner thighs, and buttocks) or the clothing covering them, of a child, or of the perpetrator by a child, for purposes of sexual arousal or gratification, except that, it does not include acts which may reasonably be construed to be normal caretaker responsibilities; interactions with, or demonstrations of affection for, the child; or acts performed for a valid medical purpose."

Father also claims that his own conduct in connection with the investigation, in which he readily cooperated with police and even offered to take a lie detector test, are "hard to reconcile" with the finding he had sexually abused E.J.

B. *Governing Law/Standard of Review*

"When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins and ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.) The trier of fact weighs the evidence and determines issues of credibility; those determinations and assessments are binding and conclusive on the appellate court. (*In re Marriage of Dick* (1993) 15 Cal.App.4th 144, 160.) Put another way, we are without power to judge the effect or value of the evidence, reweigh it, consider the credibility of witnesses, or resolve testimonial or evidentiary conflicts or the reasonable inferences that may be drawn therefrom. (*Overton v. Vita-Food Corp.* (1949) 94 Cal.App.2d 367, 370, disapproved on another point as stated in *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 866, fn. 2.) Instead, "[o]ur role is limited to determining whether the evidence before the trier of fact supports its findings. [Citation.]" (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766.)

Moreover, if substantial evidence exists in the record (*Grappo v. Coventry Financial Corp.* (1991) 235 Cal.App.3d 496, 507 [evidence is substantial if of

" 'ponderable legal significance,' 'reasonable in nature, credible, and of solid value' ")), we are bound to uphold the judgment, order and/or finding based on that evidence.

With this standard in mind, we now turn to father's contentions on appeal.

C. *Analysis*

1. *Abel Test*

Turning first to the Abel test, we conclude that even if the trial court erred by excluding the results of that test such error was harmless. Under the harmless error rule, "[w]e will not reverse for error unless it appears reasonably probable that, absent the error, the appellant would have obtained a more favorable result." (*In re Jonathan B.* (1992) 5 Cal.App.4th 873, 876, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Here, the SOD clearly shows that although the trial court ruled to exclude the results of that test, the court noted that even if it considered those results it would still conclude that father had sexually abused E.J. Thus, for this reason alone we conclude any alleged error by the trial court was harmless in excluding the results of the Abel test. (See *In re Jonathan B.*, *supra*, 5 Cal.App.4th at p. 876.)

Moreover, father does not dispute that the trial court as fact finder is afforded broad discretion in determining the weight to be given to evidence, in this case the results of the Abel test (assuming arguendo the results were deemed admissible by the trial court). (See *People v. Slocum* (1975) 52 Cal.App.3d 867, 891 [the fact finder decides what weight to give properly admitted evidence]). Father also does not dispute that the trial court properly exercised *that* discretion when it decided to give such evidence "little weight" because of a multiple of factors including the failure to use the most current

version of the test, the use of shortened versions of the test and the failure to address standard error deviation, among other concerns.

We therefore conclude it was not reasonably probable that the trial court would have reached a different finding, one more favorable to father, regardless of whether the results of father's Abel test were excluded or admitted into evidence. (See *In re Jonathan B.*, *supra*, 5 Cal.App.4th at p. 876.)

That the trial court as fact finder found the instant case to be an "extremely close question as to whether abuse occurred" does not change our conclusion on this issue or that there is substantial evidence in the record to support the finding that father sexually abused E.J. Whether a case is "close" or "extremely close" is not the equivalent of insufficient evidence, and as a reviewing court our function is not to reweigh the evidence just because there was contrary evidence presented supporting a different outcome or finding: "Conflicts and even testimony subject to justifiable suspicion do not justify a reversal, for it is the exclusive province of the trier of fact to determine the credibility of a witness." (*People v. Duncan* (1981) 115 Cal.App.3d 418, 429, disapproved on another point as stated in *People v. Anderson* (2001) 25 Cal.4th 543, 575.) Unless it is clearly shown that "on no hypothesis whatever is there sufficient substantial evidence to support the [trier of fact's finding or decision]" we will not reverse. (See *People v. Hicks* (1982) 128 Cal.App.3d 423, 429.)

Here, there is substantial evidence in the record supporting the finding in the SOD that father sexually abused E.J., a finding father does not, in any event, *directly* challenge

on appeal. This evidence includes nanny's statements,¹⁵ the testimony of mother and CPS worker Melendez,¹⁶ the forensic interview of E.J. by Shultz and the report by E.J.'s therapist Kesten-Selhay, which, whether considered individually or collectively, constitute sufficient evidence to support the finding of sexual abuse of E.J. by father.

2. *Testimony by Mother's Therapist*

Briefly, father had elicited testimony from several witnesses that mother had never complained about spousal abuse until *after* she accused him of molesting E.J. In response, mother called her former therapist, Dr. Stephen Doyne, PhD, to testify mother had in fact disclosed she was abused by husband before the child abuse allegations arose. The trial court reviewed in-camera the records of mother's treatment, redacted the records other than references to domestic violence and produced them to father.

When Dr. Doyne took the stand, he testified that mother had described instances of spousal abuse by father during therapy sessions with him in 2007, before mother alleged father sexually abused E.J. Specifically, Dr. Doyne described mother's accounts

¹⁵ As noted *ante*, father suggests (in the context of discussing mother's credibility issues) he was prejudiced because he was unable to cross-examine nanny in court *or* depose nanny *or* even to question her informally about her statements regarding E.J.'s "bad manners." Father also suggests (or implies) that mother is to blame for his inability to do any of these things. However, there is nothing in the record to show what steps, if any, father took to question nanny, whether formally *or* informally, or what role, if any, mother allegedly played in frustrating his attempts to do so.

¹⁶ To the extent father claims the trial court could not consider the Melendez interview because Melendez asked E.J. a "leading question," we conclude the trial court satisfactorily addressed that issue in the SOD and, in any event, its consideration of E.J.'s statements in response went to weight and not admissibility. (See e.g., *Imperial W. Co. No. 1 v. Irrigation Dist.* (1923) 62 Cal.App. 286, 292-293.)

of emotional, physical and sexual abuse by father, including being pushed and kicked by father; having her finger broken by father; and father tearing off mother's clothes and forcing her to have sex with him.

According to father, such testimony was not improper. However, also according to father, Dr. Doyne gave expert testimony while on the stand when he "testified about how abused spouses normally present themselves during therapy and opined that Mother's behavior during their meetings was consistent with that of other abused spouses."

It is this additional testimony (in quotes, *ante*) that father claims is error and warrants a reversal of the finding he sexually abused E.J. Specifically, father contends this additional testimony figured prominently in the court's determination that mother was credible and "inevitably tipped the balance [of credibility] in Mother's favor." His contention is unavailing.

Our independent review of the record shows the trial court consistently sustained father's objections to questions posed by mother to Dr. Doyne on the basis that the questions were improper and ostensibly called for expert testimony. By way of example only, the record shows the trial court sustained father's objections regarding whether culture (mother and father are both from India) influences the reporting of spousal abuse and whether someone who grows up in an abusive home is more likely to be an abuser him- or herself.

The record also shows that in sustaining father's objections to questions that required an expert opinion, the trial court repeatedly noted that such questions were

beyond the scope of this witness, who was not identified as an expert, and that Dr. Doyne was merely testifying as a "percipient witness as to what you [e.g., mother] told him based on the issue of your credibility" in reporting the spousal abuse before the allegations of child abuse arose. Thus, the record shows the trial court limited Dr. Doyne's testimony to statements made by mother during therapy sessions and to Dr. Doyne's *personal* observations of mother in those sessions. Such testimony by a percipient witness is not improper. (See *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 329-330 [rejecting argument that an "opinion" from percipient witness whether party could have avoided hitting a truck was improper because the "opinion" was an "'impression[] or sensation' that was 'not susceptible of exact reproduction or description in words' . . . and the question asked of [the witness] 'did not call for an opinion from him depending upon facts which he had subsequently learned,' but rather was based on events 'which he had personally observed and felt.' [Citation.]"]; see also *Bouse v. Madonna Construction Co.* (1962) 201 Cal.App.2d 26, 33 [trial court did not error in allowing a percipient witness to answer whether a traffic "taper" was sufficiently gradual to allow the traffic to get through without hitting the barricades because that testimony was the "obvious result of [the witness's] comparison of what he observed—the length of the taper and the maximum length and size of the vehicles he saw traveling through it without incident," which testimony fell "clearly within the classification of permissible nonexpert opinions."].)

Finally, even assuming *arguendo* that the trial court erred when it allowed Dr. Doyne to testify as an "expert" in connection with whether father abused mother, we

conclude that error was harmless because it is not reasonably probable a finding or result more favorable to father would have been reached in the absence of the alleged error.

(See *In re Jonathan B.*, *supra*, 5 Cal.App.4th at p. 876.)

The record clearly shows that the trial court did not base its credibility decision regarding mother solely or even substantially on Dr. Doyne's testimony. Indeed, in connection with mother's question to Dr. Doyne whether he found her credible (in connection with her reports of spousal abuse), over father's objection the trial court expressly stated that it alone would decide credibility and added that "it would *not* be based on what the doctor [e.g., Dr. Doyne] said." (Italics added.)

Consistent with this statement, the SOD shows the trial court's determination mother was credible—and thus did not orchestrate or influence the sexual abuse allegations to thwart father's custody and visitation of E.J., as father alleged—was expressly based on myriad factors including mother's testimony and demeanor at trial and the testimony of witnesses *other than* Dr. Doyne.

Along those same lines, when the SOD discusses the testimony of Dr. Doyne and its effect on mother's credibility, it merely states mother *reported* being the victim of domestic abuse "two years *before* the current dispute [involving E.J.], and two months *after* the parties had reached an *agreement* for 50/50 joint custody." The SOD says nothing about mother's credibility in connection with Dr. Doyne being an expert on spousal abuse or whether, in light of his training and experience, he opined mother was in fact abused by father. Thus, even if the trial court erred in admitting the "expert"

testimony of Dr. Doyne, we conclude that error is harmless. (See *In re Jonathan B.*, *supra*, 5 Cal.App.4th at p. 876.)

DISPOSITION

The trial court's modification order awarding respondent mother sole legal and physical custody of E.J. is affirmed. Mother to recover her costs of appeal.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.